Supreme Court, U.S.
FILED
06-519 OCT 6 - 2006
OFFICE OF THE CLERK

No. 06A168

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.

Petitioner,

vs.

ROBERT CHOW,

Respondent.

On Petition for Writ of Certiorari to the First District California Court of Appeals, Div. Five

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI, VOLUME I

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F I L E D
San Francisco County Superior Court
FEB - 7 2003

GORDON PARK-LI, Clerk
BY: /s Philomena Dias
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT CHOW, Plaintiff, vs. PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, INC, and DOES 1-50, Defendants	)	Case No. CGC-01-323394 **JUDGMENT BY COURT AFTER DEFAULT** DATE: January 23, 2003
PAUL TALCOTT CURRIER, Cross-Complainant, vs. ROBERT MICHAEL CHOW, SYLVIA CHOW, RICHARD SCHNEIDER, VINCENT M. SPOHN, and DOES 1-100, Cross-Defendants.	)	TIME: 9:00 a.m. DEPT.: 218

This matter came on for hearing on January 23, 2003, before the Honorable LORETTA M. NORRIS, Judge presiding in Department 218, Michael J. Fish appearing as attorney for Plaintiff ROBERT CHOW, and it appearing that defendants COMMUNICATION BRIDGE GLOBAL, INC., and PAUL TALCOTT CURRIER having been regularly served with process, having failed to appear and answer the plaintiff's complaint filed herein, and the default of said defendants having been duly entered on January 17, 2002, and evidence having been introduced in open session of this Court:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff ROBERT CHOW recover from said defendants the sum of $350,000.00 [initialed "LN"] interest on said sum to the date in the sum of $-0-, and attorney's fees in the sum of $-0-, total of $350,000.00 [initialed "LN"], with plaintiffs costs and disbursements amounting to the sum of ["per cost memo" written by Loretta Norris], together with interest on said judgment as provided by law.

The Clerk is ordered to enter the judgment.

Dated: Feb. 7, 2003 [handwritten by Loretta Norris]

/s Loretta M. Norris
Judge of the Superior Court

Endorsed
FILED
San Francisco County Superior Court
JAN 24 2005

GORDON PARK-LI, Clerk
By: DAVID SWANSON
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 613

ROBERT CHOW, Plaintiff,	)	Case no. CGC-01-323394
vs.	)	STATEMENT OF DECISION
PAUL TALCOTT CURRIER, et al., Defendants.	)	Cal. Rules of Court §232
AND RELATED CROSS-ACTION.	)	Hon. Ernest H. Goldsmith

This matter came on regularly for trial by the Court on November 2, 2004. Plaintiff Robert Chow ("Chow") was represented by Michael J. Fish, Esquire, of Fish & Snell, P.C.; defendant Paul Talcott Currier ("Currier") appeared in propria persona. Trial by the Court was held on November 2, 3, 4, 5,15, 16, 17, 29, and 30, 2004. At the conclusion of plaintiff Chow's evidence, the Court announced its tentative decision to grant judgment pursuant to Code of Civil Procedure section 631.8 for Defendant on all causes of action. The Court then heard additional argument from

Plaintiff. The Court advised the parties that the matter would be taken under submission, and if the Court adopted its tentative decision, evidence and argument by Defendant would be unnecessary. If the Court decided to change its tentative decision in favor of Plaintiff on any causes of action, Defendant would be given the opportunity to call witnesses and both sides would argue the case further. The Court has considered the oral and documentary evidence admitted at trial, as well as the briefs, memoranda, and arguments submitted to the Court. The Court issued its Tentative Statement of Decision on December 27, 2004. Plaintiff filed Objections to Proposed Statement of Decision pursuant to California Rules of Court 232(d), which the Court has read and considered. The Court issues its findings of fact and conclusions of law in this Statement of Decision.

BACKGROUND

This trial concerned eight causes of action relating to a failed start-up company called Communication Bridge USA, Inc. ("ComBridge"). Plaintiff Robert Chow alleged causes of action, which include: (1) Fraud and Deceit, (2) Negligence, (3) Negligent Misrepresentation, (4) Intentional Breach of Fiduciary Duty, (5) Constructive Fraud, (6) Negligent Breach of Fiduciary Duty, (7) Breach of Contract, and (8) Defamation.[1]

---

[1]Defendant's cross-complaint was dismissed pursuant to the granting of Plaintiff's Motion to Strike.

Defendant Paul Currier met plaintiff Robert Chow in 1999. Chow was a teacher of telecommunications at several schools in the Bay Area. He was also employed by MCI Worldcom as a telecommunications specialist. Currier has a varied business background and sought to create a wireless communications company. Their mutual interests resulted in their entering into a business relationship to create a telecommunications start-up company. The initial officers, directors, and shareholders of ComBridge were Currier and Chow. Plaintiff Chow has over 20 years' experience in optical voice and data networks. According to his testimony at trial, plaintiff Chow anticipated working strictly in the technical operations of the company, while Defendant Currier would be responsible for the fundraising and routine operations. ComBridge was in the business of developing and deploying high speed wireless internet services, converged technology, IP telecommunications, e-commerce, and Web, WAN, and VPN services.

The complaint alleged various misrepresentations and omissions on the part of defendant Currier. Chow alleged that Currier represented that he would bring in millions of dollars from investors, and yet failed to bring in a single investor. Further, that defendant Currier represented to plaintiff Chow that he had a well-respected business background. According to Chow, defendant Currier withheld disclosure of numerous negative facts about his background. The negative facts cited are as follows: (1) felony drug conviction resulting in prison time, (2) allegations of spousal abuse, (3) past due child support payments, (4) bad credit history, (5) history of alcoholism, (6) outstanding liens from

the Internal Revenue Service, and (7) a sexual harassment case in United Stated Federal District Court.

Plaintiff Chow invested his own time and several hundred thousand dollars of his money into ComBridge in addition to his having solicited money from family and friends. Without full knowledge and disclosure regarding the background of his co-founder, plaintiff Chow claims that he was not properly informed of the risks of his investment. Plaintiff subsequently agreed during trial that, save the defamation claim, the crux of each remaining cause of action was solely that Defendant failed to specifically disclose that he served prison time for a felony drug conviction seventeen years ago. In summary, Chow's causes of action are based on two premises. First, he would not have co-founded ComBridge and invested money if he had known of Currier's background. Second, that Currier's background, once known, would have to be disclosed to prospective investors which would make it impossible to raise capital, resulting in the loss of his investment.

Plaintiff premised his defamation claim on a letter distributed to all the shareholders of ComBridge. According to Plaintiff, following a shareholders' vote that effectively removed defendant Currier from his position as CEO, Defendant maliciously distributed this libelous letter in an attempt to tarnish Chow's reputation, and accordingly, ruin the company.

Defendant Currier in response argued that the alleged defamation was privileged inasmuch as he was a corporate officer and had a duty to advise the shareholders of his suspicions and did so pursuant to privilege under Civil Code Section

47(c). Currier also asserted that he made the statements without malice, therefore, the defamation claim was not actionable. In opposing the remaining causes of action, Defendant claimed that Plaintiff failed to establish the requisite elements in each remaining allegation.

BURDEN OF PROOF

"Except as otherwise provided by law a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." California Evidence Code section 500. The rule in California is that "whatever facts a party must affirmatively plead, that party also has the burden of proving." Witkin, California Evidence, section 6. For Plaintiffs, these facts are the elements of each cause of action pleaded, and for Defendant, "the rule means that affirmative defenses cannot be raised by mere denial, but must be specifically pleaded." Id. Because this is a civil case, "burden of proof requires proof by the preponderance of the evidence." California Evidence Code section 115. Plaintiff bears this burden.

Although Defendant did not affirmatively plead his qualified privilege defense to the defamation claim, the Court granted his motion to amend his answer to include the affirmative defense. Under California Civil Code section 47(c), the "common interest privilege" immunizes a defendant who makes a statement to others on a matter of common interest so long as the statement is made without malice.

An exception to the requirement that the qualified privilege must be affirmatively pled may be invoked where a complaint alleges facts

indicating applicability of a defense. Crucy v. Gannet Company, Inc. (1988) 64 Cal.App.4th 356, 367. In the complaint, Plaintiff alleged libel in an annual report of shareholders. This allegation clearly suggested a qualified privilege defense. Further, in light of the fact that Plaintiff modified his defamation claim to include Exhibit 19, which contained the alleged derogatory statements, during the course of the trial, the Court found that allowing Defendant to amend his answer to include the qualified privilege defense imposed no prejudice on Plaintiff. In any event, defendant Currier still bears the burden of proving by a preponderance of the evidence that his statements were protected by qualified privilege.

QUESTIONS OF LAW

BAJI 12.35 sets out the essential elements required in a fraud claim. The essential elements of a claim of fraud by concealment are: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose the fact to plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as [he] did if [he] had known of the concealed or suppressed fact, (5) the concealment or suppression of the fact causes the plaintiff to sustain damage.

Constructive fraud is codified in Civil Code section 1573. Constructive fraud consists (1) in any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or (2) in

any such act or omission the law specifically declares to be fraudulent, without respect to actual fraud. Civil Code section 1573.

Plaintiff agreed that the crux of his fraud causes of action, as well as the others except the defamation claim, was that Defendant failed to disclose his drug conviction prior to entering into a business relationship with Plaintiff, thereby causing the loss of his investment as well as the investments of his friends and family. Currier advised Chow in November 2000, about seven months after incorporation, that Currier had suffered a felony narcotics convention [*sic*, probably should read "conviction"] for which he served an eighteen-month incarceration about fifteen years earlier. Throughout the trial, plaintiff Chow was asked to come forth with legal authority in support of the claim that this was actionable. He produced none. Plaintiff could cite no cases that allowed a business partner to recover damages for a failed business based solely on the nondisclosure by Defendant of a fact about his background.

Plaintiff initially cited Eddy v. Sharp (1998) 199 Cal.App.3d 858 for the proposition that Defendant had a duty to disclose his felonious background prior to entering into a business relationship with plaintiff Chow. In fact, Eddy says no such thing. Eddy involved a misrepresentation made by an insurance agent to policyholders regarding the scope of their coverage under a policy they purchased. First, nothing in Eddy touched on failure by the agent to disclose his background. Moreover, the language referenced by Plaintiff applies only to business *transactions* rather than the circumstances

relevant when entering into a business *relationship.*

Plaintiff ultimately relied on Stokes v. Henson, (1990) 217 Cal.App.3d 187, 197. In Stokes, plaintiffs were granted rescission of their investments because defendant violated Corporations Code provisions by commingling investor's funds with his own and for various misrepresentations and omissions, primarily his lack of knowledge and sophistication in commodities trading. The court ruled in favor of the plaintiffs primarily based on defendant's misrepresentations and omissions *involving the risk of the investments and his use of their investment money.* In other words, Stokes involved failure to disclose fraudulent *conduct* in managing the investments, rather than fraudulent inducement for failure to reveal background facts.

Although the Stokes court loosely refers to the defendant's background, it is only to establish the existence of a fiduciary duty. The plaintiffs allege that they "invested based solely on [defendant's] experience and success in the field." Id. at 194. However, the crux of the case is not that they relied on defendant's background without knowing all the facts, but instead that defendant commingled their assets with his own assets and failed to fully disclose the status and risk of their investments. Nothing in the opinion addressed whether defendant's background was accurately stated to the investors or fully disclosed. The references to defendant's background are made solely in opposition to defendant's appellate defense that he did not have a fiduciary duty to plaintiffs.

Finally, Plaintiff argues that People v. Smith, (1989) 215 Cal.App.3d 230 held that a felonious

background is a material fact that requires disclosure before soliciting investments. Smith was a criminal case in which an inexperienced investor held himself out as a financial advisor and misappropriated and commingled the funds of his client investors. The court ruled that the prior felony was not a material fact because it was reduced to a misdemeanor and was then subsequently expunged. Plaintiff Chow argued that the Court nonetheless acknowledged that had the crime been a felony, it would have to be disclosed. However, the Smith court expressly limited its determination as to whether a past felony is a material fact to the context of the Corporations Code section 25401. However, Corporations Code section 25401, as interpreted by the appellate court, does not cover "simple nondisclosure" or the mere nondisclosure of material facts; rather "§ 25401 covers only misstatements of material fact and those omission [*sic*] that render misleading the statements that were made in connection with the sale or purchase of securities." Tse v. Ventana Med. Sys. (2002) 297 F3d 210. In Bowden v. Robinson (1977) 67 Cal.App.3d 705, 717, the court reflected the same assessment of section 25401, that it does not apply to simple nondisclosure. Thus, none of the case law cited by Plaintiff confirms his interpretation of the law.

EXPERT WITNESSES

Plaintiff Chow called Vincent Spohn and Gianeonenico Rende to testify as to the duty to disclose a prior felony conviction when seeking investments. Both witnesses testified to a duty to

disclose in the financial industry, rather than between business partners.

Witness Vincent Spohn, Esquire, was called by Plaintiff. Mr. Spohn is a criminal defense attorney who states he provided legal services to ComBridge. He testified that Chow was upset at having invested money in ComBridge. He further offered his professional opinion that Currier had a duty to disclose his narcotics conviction to Chow at the outset of their relationship. It was unclear what, if any, basis or background Spohn had to qualify him to offer such an opinion and the Court assigns no weight to it.

Plaintiff called Gianeonenico Rende, an investment consultant, as an expert witness. Mr. Rende has impressive academic and professional credentials. He cited several rules promulgated by the Securities and Exchange Commission and the National Association of Securities Dealers. He testified that professionals in the financial industry are required to make disclosure of any negative factors in their backgrounds. He stated that the "overriding rule is full disclosure." His testimony was convincing that the better practice is to make full disclosure; however, he drew from financial industry examples, and provided no dispositive testimony that partners in a start-up were under an absolute or legal obligation to disclose. He acknowledged to not being an expert in the field of private financial placements, which more nearly applies to the instant case.

Mr. Rende's most valuable testimony was his observations and opinions that the investment climate for start-up "hi-tech" ventures was very negative in 2000 and 2001, the relevant time period, and that the telecommunications industry

suffered from heavy overcapacity. The Court found Mr. Rende well-qualified to offer this evidence and his opinions. Mr. Rende's evidence and opinions were highly persuasive that the failure of ComBridge and the loss of Chow's investment in it may well have been largely or entirely due to maket and historical forces and nothing to do with nondisclosure by Defendant. There is strong factual support for this position in the instant case inasmuch as there was extensive evidence put forward by Chow that the flow of investment capital in this startup telecommunications venture ceased during this relevant period.

PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ANY OF THE ALLEGED FRAUD CAUSED DAMAGES

Plaintiff does not establish the required showing to prevail on any of the first seven causes of action because he fails to demonstrate that the alleged nondisclosure caused any damages.[2]

Trial testimony revealed that the drug conviction did not cause difficulty in acquiring investments. The evidence presented by Plaintiff shows that the first concern from an investor stemmed from a sexual harassment suit involving the defendant found on a web search. The investor and Chow read the United States Federal District Court opinion. Based on the discovery of the

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[2]These causes of action include: (1) fraud and deceit, (2) negligence, (3) negligent misrepresentation, (4) intentional breach of fiduciary duty, (5) constructive fraud, (6) negligent breach of fiduciary duty, and (7) breach of contract.

lawsuit, the investor withheld further investment. Chow testified that he was horrified when he read Currier's federal case. Plaintiff attempts to argue that knowledge of this harassment suit prompted a further investigation into Defendant's background, revealing the felony conviction. Yet, the harassment lawsuit judgment that caused the investor to withdraw his investment, and which horrified Chow, conclusively established no wrongdoing by Defendant. In fact, defendant Currier was the *plaintiff* in that case. To be sure, although the sexual harassment suit mentioned an investigation into a sexual harassment against Currier, the court noted that this investigation was "without basis in fact." Currier v. Free Radio Europe, U.S.D.C. Court of Appeals No. 98-7020. Thus, the first investment allegedly withheld was was based on an incident where Defendant did nothing wrong, and was even vindicated by the federal appellate court. This investment was withheld not for failure to disclose the drug conviction, but from a different concern about a sexual harassment suite in which Mr. Currier was the suing party and without blame or culpability.

Further, Benson Chow, the only outside investor to testify, did not convince the Court that the felony conviction caused him to stop investing. Benson Chow testified that he would not have invested had he known of the felony. However, Benson Chow also said that he was told by plaintiff Chow that defendant Currier was in prison for four to five years, when in fact Currier served eighteen months. Benson Chow merely asked for Mr. Currier to take a less prominent role in the company. Finally, the Court finds Benson Chow's testimony was equivocal in regards to the prospects of future investment.

This Court does not reach the issue of whether the prior felony conviction is a material fact because Plaintiff failed to establish by a preponderance of the evidence that the nondisclosure caused damage. This Court does take notice that in arguing this failed disclosure was a material fact, no evidence whatsoever was proffered by Plaintiff that Currier's past felony was a crime of moral turiptude. The trial testimony showed that ComBridge was having difficulty acquiring investments prior to the disclosure by Defendant of his prior felony. In fact, the complaint in this case alleges that defendant Currier couldn't bring in any money prior to the disclosure. The Court took notice that at the time ComBridge was created, many startup communications companies were unable to attract investment capital as testified to by Mr. Rende. Further, entering into the wireless market is an endeavor fraught with obstacles such as opposition from city utility companies, difficulty obtaining permits, and numerous logistical problems, according to the evidence. It is in fact highly speculative that Plaintiff would have been able to raise enough money to get ComBridge up and running notwithstanding the disclosure issue.

The burden rests with Plaintiff to show that the delayed disclosure of the felony conviction directly caused ComBridge to lose out on an amount of investment needed for ComBridge to survive and save Chow's investment. No showing was made that, but for the late disclosure, ComBridge was on its way to success. Bald assertions by Plaintiff's attorney that the company was a good idea do not amount to a preponderance of the evidence

Although plaintiff Chow testified that he would not have invested in the company nor gone into business with defendant Currier had he known of the felony conviction, he did not demand that he get his investment back following the revelation. In fact, Chow *continued to invest.* The evidence indicated that the overwhelming majority of the money invested by plaintiff Chow was made *after* knowledge of Defendant's felony conviction was revealed. Plaintiff's concern that his family and friends would lose their investments had he not continued investing is considered by the Court but found to be unconvincing. The trial testimony suggests that plaintiff Chow and investors who were Chow's friends and family mobilized to depose Currier from his post as CEO with the intent of running the company which eventually fell into bankruptcy. The Court finds Chow's testimony lacking in credibility.

In 2001, when Communication Bridge USA was founded, many start-up companies did not succeed. In this investment climate, every investor and business partner takes on the risk that the startup business will fail. Plaintiff Chow testified as to the abilities and value of defendant Currier in starting the company. Indeed, Plaintiff conceded that without the complaint from the initial investor, he would have continued doing business with Defendant. In other words, the conduct of defendant Currier in his capacity as a director is not in question. Chow's testimony that he would not have joined Currier in this venture does not ring true. The Court finds that the blame fixed on Currier's nondisclosure by Plaintiff is a revisionist theory concocted by Chow. The Court further finds that Chow's causes of action based on -

nondisclosure have no substance or merit whatsoever.

PLAINTIFF'S DEFAMATION CLAIM IS BARRED BY QUALIFIED PRIVILEGE

The basis of Chow's defamation cause of action is Trial Exhibit 19, a letter sent by Currier to fellow shareholders in ComBridge on August 25, 2001. This was shortly after Currier was deposed as CEO and attempts were made by Chow and his investor relatives to cancel Currier's stock ownership. Currier testified he believed these acts were illegal. The letter included such statements as: Chow committed criminal fraud on the corporation; Chow defrauded Currier out of 10,000,000 shares of stock; Chow divulged intellectual property owned by ComBridge to his employer WorldCom and, Chow committed mail fraud. Defendant Currier amended his answer to include a defense of qualified privilege under Civil Code section 47(c). Civil Code section 47(c) states, "a privileged publication ... is one made ... in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." The Court finds that the letter was a disclosure to fellow shareholders on matters of common interest. See Cuenca v. Safeway Employees Federal Credit Union (1986) 180 Cal.App.3d 985. The matters referred to in the letter would not only be matters of common interest to the shareholders, but would be required

disclosures in the discharge of defendant Currier's fiduciary duty as an officer of the company.

Of course, as argued by Plaintiff, this defense is unavailable if a showing of malice is proven. Malice is defined as "motivated by hatred or ill will towards the plaintiff or *by a showing that the defendant lacked reasonable grounds for the belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.*" (Emphasis added) Lundquist v. Heinz Reusser, (1994) 7 Cal.4th 1193, 1213.

The Court finds that the allegations made in the letter in question were made with a goo faith belief in the truth of the assertions. The Court further finds that a solid factual basis existed for Currier's beliefs in view of Chow's actions to cancel his stock and throw him out of the company. Defendant Currier, during testimony taken pursuant to Evidence Code section 776, convincingly testified that he believed at the time that plaintiff Chow was conspiring with other shareholders to wrest control of the company for the benefit of Chow's family and friends and that Chow was engaging in corporate voter fraud. Defendant Currier had contacted several law enforcement agencies prior to the distributio of the letter and is currently pursuing a lawsuit in Federal District Court against plaintiff Chow based largely on the allegations made in the letter.

Furthermore, the text of the letter includes numerous qualifications such as "I believe" and on the stand, defendant Currier persuasively testified that he stands by each allegation. This Court finds that Defendant proved by a preponderance of the evidence that, at the time he drafted the letter, he was making a privileged and good faith effort to warn fellow shareholders of possible impropriety

on the part of officers of ComBridge. The Plaintiff's defamation claim is without merit.

The Court finds and declares as follows:

CONCLUSIONS

1. The allegations arising from a failure to disclose negative facts regarding Defendant's background fail to establish by a preponderance of the evidence that the nondisclosure caused damage. Plaintiff has failed to come forth with any law and/or credible facts to convince the Court that Defendant's failure to disclose his background more likely than not caused damages to Plaintiff.

2. Further, the Court finds by a preponderance of the evidence that the defamation claim is precluded by Defendant's qualified privilege defense. The statements made in the letter circulated to shareholders was made to individuals with a common interest and without malice.

3. Judgment is for Defendant on all causes of action and against Plaintiff. Defendant is prevailing party and shall have costs of suit. All Defendant's costs which were waived pursuant to court order shall be paid to the Clerk of the Court by Plaintiff.

IT IS SO ORDERED. Let judgment be entered accordingly.

DATED: JAN 24 2005

/s

ERNEST H. GOLDSMITH
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*. Defendants.	Case No. 01-323394 **ORDER DENYING DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay Filed May 12, 2005

The above-captioned motion came on for hearing at the above-captioned time and date in

the above-captioned court. Jeffrey Marc Weiss of Weiss & Weissman appeared for Defendant Communication Bridge Global, Inc. ("CBG."). No appearance was made on behalf of Plaintiff Robert Chow. Upon review of the motion papers filed with the court, the documents in the case file, and the oral arguments of counsel for CBG, this court found as follows:

CBG was put on notice as early as August of 2001 that it was a defendant in the above-captioned action;

CBG's inability to hire legal counsel, even if caused by Plaintiff Robert Chow's economic oppression of Currier and CBG is not sufficient good cause for granting relief from judgment at this date;

The pleadings by Chow were against different entities, namely, Paul Currier and CBG, and therefore, a judgment in favor of Currier after trial is not inconsistent with a default judgment against CBG in Robert Chow's favor; and therefore,

IT IS HEREBY ORDERED THAT CBG's motion for relief from default judgment is DENIED.

Dated: May 12, 2005 By: /s

Hon. Ronald
Quidachay
Judge, Superior Court

Filed 2/28/06 Chow v. Communication Bridge Global CA 1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not cited for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FIVE

ROBERT CHOW,
Plaintiff and Respondent,

A110455
(San Francisco Co. Super.Ct. No. 323394)

v.

COMMUNICATION BRIDGE GLOBAL, INC.,

Defendant and Appellant

_____/

Communication Bridge Global, Inc., (CBG) appeals contending the trial court erred when it denied its motion to set aside a default judgment. We conclude the court did not abuse its discretion and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Chow and Paul Talcott Currier formed CBG, a high-technology start-up company.

In August 2001, Chow filed a complaint against Currier and CBG. Some of the causes of action named Currier alone; others named Currier and CBG. The general thrust of the complaint was that Currier misrepresented his background and his business abilities in a way that was detrimental to Chow.

When Currier and CBG failed to file appropriate responses, Chow requested and obtained their defaults. On February 7, 2003, the trial court entered a default judgment against Currier and CBG for $350,000.

In April 2003, Currier, acting through an attorney, Ricardo Saria, filed a motion to set aside the judgment against him personally. The trial court granted the motion and vacated the judgment against Currier *only*.

In November 2004, the revived action by Chow against Currier proceeded to a court trial. At that point, Currier was proceeding in pro per. On January 24, 2005, the court issued a judgment and statement of decision in favor of Currier on all causes of action that had been tried.

Several months later, in April 2005, CBG filed a motion to vacate the default and default judgment that had been entered against it. It argued the February 2003 judgment should be set aside because it was obtained through "extrinsic fraud." The trial court conducted a hearing on CBG's motion and denied it.

II. DISCUSSION[3]

CBG contends the trial court erred when it denied its motion to vacate the February 2003 judgment.

Where, as here, a motion to set aside a default judgment is made more than six months after the judgment is entered, the motion is not directed to the court's statutory power to grant relief for mistake or excusable neglect (Code Civ. Proc., §473), but to the court's inherent equity powers. (*Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 352.) We review a lower court's ruling on such a motion under an abuse of discretion standard. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) The trial court's exercise of discretion must be considered in light of the strong public policy favoring finality: "[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional case should relief be granted." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1071.)

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[3]On September 12, 2005, while this case was being briefed, CBG filed a request that asked this Court to take judicial notice of the trial court's ruling on a motion to vacate in a different case. We deferred ruling on the request until the merits of the appeal. Having now considered CBG's request, we deny it. An appellate court can, but is not required to, take judicial notice of materials that were not presented to the trial court in the first instance. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) The court declines to take judicial notice of the document CBG has identified.

Equitable relief from judgment may be granted on grounds of extrinsic fraud or mistake. (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470-473.) "Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other that from his own negligence, fraudulently prevented from fully participating in the proceeding. ... The essence of extrinsic fraud is on party's preventing the other from having his day in court." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.) The term extrinsic mistake is used to describe situations in which circumstances extrinsic to the litigation have deprived a party of a hearing on the merits. (*Rappleyea v. Campbell*, *supra*, 8 Cal4th at p. 981.) The concept is applied most commonly when a party excusably neglects to appear and present a defense. "If such neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief is present . . . ." (*Kulchar v. Kulchar*, 1 Cal.3d at p. 471, italics omitted.)

Applying those principles in this case, it would be difficult to conclude CBG is entitled to relief on grounds of extrinsic fraud or mistake. CBG's primary theory on appeal is that the default judgment was entered because it lacked the funds necessary to hire an attorney to represent it. CBG lacked the necessary funds, it contends, because Chow had depleted its funds by filing a "frivolous" lawsuit. Thus, CBG seeks to set aside the judgment because of what it describes as "economic oppression." CBG has not cited any case that holds a judgment may be set aside on the grounds of "economic oppression" and it would be difficult to characterize "economic oppression" as either

"fraud" or "mistake" as those terms are commonly understood.

However, we need not base our decision on this grounds because CBG cannot prevail in any event. A party seeking to set aside a judgment based on extrinsic fraud or mistake must satisfy three elements. First, the party must demonstrate that it has a meritorious case. Second, the party must articulate a satisfactory excuse for not presenting a defense to the original action. Third, the party must demonstrate diligence in seeking to set aside the default once discovered. (*Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 982.)

Here CBG attempts to satisfy the first element by noting that Chow made similar accusations against it and Currier. Since Currier prevailed, CBG contends that it would prevail too. However the fact that Currier prevailed does not necessarily mean that CBG also would prevail. To determine that question would require an analysis of the causes of action that were tried, the relationship between Currier and CBG, and possibly, issues of res judicata and collateral estoppel. CBG has not even attempted to analyze those issues[4]. An appellant has the burden of proving the trial court erred. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) CBG has failed to carry its burden in this case.

Next, CBG contends it did not present a defense initially because it lacked the funds necessary to do so. While the evidence CBG cites on this point, declarations from Currier in which

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[4]CBG discusses some of these issues for the first time in its reply brief. We do not address issues that are raised in that fashion. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2.)

he details the wrongs allegedly visited on CBG by Chow and others, are less than definitive, we will assume for purposes of this argument that CBG lacked the funds necessary to defend the suit.

The third factor, diligence, is clearly lacking. The record indicates the judgment at issue was entered in February 2003 and that CBG waited more than two years to file its motion to vacate. CBG does not suggest that it was somehow unaware of the judgment; the only excuse it provides for failing to file a motion earlier is tht it lacked the funds necessary to do so. However, CBG admits its interests were aligned with Currier, and Currier filed a motion to set aside the judgment less than two months after it was entered.

CBG has failed to explain why the attorney who filed the motion for Currier could not also have filed a motion for CBG. There was a lack of diligence here.

Thus, the evidence shows CBG failed to satisfy two of the three elements needed to set aside a judgment on the basis of extrinsic fraud or mistake. Under these circumstances, we conclude the trial court did not abuse its discretion when it denied CBG's motion.

III. DISPOSITION

The order denying CBG's motion is affirmed.

/s
Jones. P.J.

We concur:

/s
Stevens, J.

/s
Simons, J.

Court of Appeal, First Appellate District, Div. 5 -
No A110455
S142357

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT CHOW, Plaintiff and Respondent,

v.

COMMUNICATION BRIDGE GLOBAL, INC.,
Defendant and Appellant

Petition for review DENIED.

SUPREME COURT
F I LE D

MAY 24, 2006

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE
Chief Justice

Jeffrey Marc Weiss SBN 84122
WEISS & WEISSMAN
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Attorneys for Defendant
COMMUNICATION BRIDGE GLOBAL, INC.

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

COMMUNICATION BRIDGE USA, INC. *et al.*,	Case No. 01-323391
Plaintiff,	**ORDER SETTING ASIDE AND VACATING JUDGMENTS AGAINST DEFENDANTS PAUL TALCOTT CURRIER AND COMMUNICATION BRIDGE GLOBAL, INC.**
-vs.-	
PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*	
Defendants.	Date : May 11, 2005 Dept. : 301 Time : 9:30 a.m. [Entered May 11, 2005]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to set aside and vacate both default judgments taken in the above-captioned action against defendants PAUL TALCOTT CURRIER and COMMUNICATION BRIDGE GLOBAL, INC. is GRANTED as unopposed. No opposition was filed. SO ORDERED.

DATED : May 11, 2005 /s_____

Hon. James L. Warren
Judge, Superior Court

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Defendant *in propria persona*

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*. Defendants.	Case No. 01-323394 **DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay [Entered April 11, 2005]

I. INTRODUCTION

This memorandum of points and authorities is presented by Defendant COMMUNICATION BRIDGE GLOBAL, INC. ("CBG") in support of its motion for relief from the default judgment entered against it on January 17, 2002, in the above-

captioned action. This court has an inherent equitable power to set aside judgements that are inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, and also because the default judgment against CBG is not consistent with the judgment in favor of Defendant PAUL TALCOTT CURRIER ("Currier") after trial.

II. ARGUMENT

A. The Judgment Was Obtained Through Extrinsic Fraud

This court has an inherent equitable power to vacate any judgment obtained through "extrinsic fraud or mistake." This power is not subject to the six-month limitations period set forth in C.C.P. §473; all a party seeking relief from judgment on the grounds of "extrinsic fraud" need show is that he, she, or it proceeded diligently upon discovery of the fraud. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 at 983-984.

This brings us to a discussion of what constitutes "extrinsic fraud or mistake." That term has been interpreted very broadly by California courts, in that "extrinsic fraud or mistake" means virtually any circumstance by which a party was deprived of a fair hearing; **there need be no actual fraud or mistake for a court to properly grant relief on these grounds!** *Marriage of Park* (1980) 27 Cal.3d 337, 342. In other words, Fraud or mistake is "extrinsic" is it deprived the party of its "day in court. Some examples of "extrinsic fraud" are "where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as in keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by

the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his interest to the other side." *Estate of Sanders v. Sutton* (1985) 40 Cal.3d 607, 614, quoting *United States v. Throckmorton* (1878) 98 U.S. 61, 65-66. Robert Chow, through his attorneys, Michael Fish and Thomas Mauriello, forced Paul Currier onto the street and into abject poverty, and further continued a three-year campaign of economic oppression against Currier, thereby putting the only remaining officer of CBG in a position where he could not effectively defend CBG's interests by hiring an attorney to represent the corporation. *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment* ("Currier Dec."), filed herewith, at ¶2. It is well-established law that a corporation cannot appear in California Superior Court without legal counsel to represent it; that is, a corporation cannot appear "in propria persona" through its non-attorney officers. *Himmel v. City Council of Burlingame* (1959) 169 Cal.App.2d 97, 101. In addition, Currier's attorney, Vincent Spohn, corruptly sold out Currier's interests to Chow, as detailed below.

The breach of a fiduciary duty arising from a confidential relationship, may warrant such relief, even though the same actions, when taken in a non-fiduciary relationship, would **not** be considered extrinsic fraud. *Estate of Sanders*, supra, at 615. Even a confidential non-fiduciary relationship, where one party trusts the opponent (e.g., the opposing parties are friends or relatives), may be grounds for granting such relief, even though identical conduct between persons not having such a relationship would not constitute "extrinsic fraud." In the instant case, Vincent Spohn, an attorney who had represented Paul Currier used his "insider" knowledge and skills to attack Paul Currier by testifying on behalf of Chow and CBUSA

in this matter, as well as taking Currier's money and property, then failed to perform any services therefor, and by taking on legal representation of interests adverse to Currier. Currier Dec., at ¶3. Chow had a fiduciary relationship to CBG and CBUSA, and a further duty not to file frivolous lawsuits against CBG. Currier Dec., ¶4. Chow also forged proxies in the election in which he claimed to have been purportedly have been elected Chairman and CEO of CBUSA. *Id.* Spohn also participated in the collection and submission of forged proxies, Spohn's theft of Currier's corporate and personal property, and conspired with Chow against Currier. Currier Dec., ¶8.

Equitable relief is appropriate where a party has induced an opponent not to appear or not to contest the action by misrepresenting fact or making false promises, upon which the opposing party relies to his or her or its detriment. *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 292. In the instant case, Chow, Spohn, and Fish all misrepresented material facts in this case by lying to the San Francisco Superior Court and the San Francisco Sheriff's Department and the San Francisco Police Department in regard to (1) Currier's right to remain in his office suite and home domicile (they claimed he had no right to occupy the premises, when in fact, as CEO of CBUSA, Currier was free to spend as much time as he wished in CBUSA's offices), (2) Currier's alleged propensity to destroy CBUSA's property (they said he was violent and would be likely to destroy CBUSA's property), and (3) lied that Currier was not actually the CEO of CBUSA (Chow claimed he was the CEO when Currier was actually still the legitimate CEO), and the like. Currier Dec., ¶5.

B. Relief From Default is Proper Where, as Here, the Default Judgment Is Inconsistent with a Judgment Obtained From an Actual Trial on the Merits In the Same Case.

It is clear that where a default judgment is not consistent with a judgment reached against a co-defendant based on the same fact and law, and the defaulting party moves to vacate the default, the motion to vacate the default should be granted.

The complaint filed in this action states only facts alleging actionable conduct by Currier. Currier Dec., ¶6, Exhibit 1 to the Currier Dec. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. *Id.* The Plaintiffs took their case against Paul Currier in this action to trial and lost on all causes of action. See the *Statement Of Decision*, Currier Dec., Ex. 2, Currier Dec., ¶7. Since the facts supporting all the causes of action against Currier and CBG allege only conduct by Currier, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons, it follows that none of the causes of action against CBG have any evidentiary support, since the facts were found not to support any causes of action against Currier. *Id.* Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice to allow the default judgment against CBG in the instant action to stand.

III. CONCLUSION

For the reasons stated above, Defendant's motion for relief from default judgment should be granted.

Respectfully submitted,
WEISS & WEISSMAN

Dated: April 6, 2005 By:/s
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Global, Inc.

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Defendant *in propria persona* [*sic*]

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.* Defendants.	Case No. 01-323394 **DECLARATION OF PAUL TALCOTT CURRIER IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay [Entered April 11, 2005]

I, Paul Talcott Currier, declare:

1. I am one of the defendants in the above-captioned matter. I have personal knowledge of the facts detailed herein, and if asked to do so, could testify competently about them.

2. In August of 2001, Robert Chow, through his attorneys, Michael Fish and Thomas Mauriello, forced me onto the street and into abject poverty, thereby putting me, the only remaining officer of

Communication Bridge Global, Inc. ("CBG") in a position where I could not effectively defend CBG's interests by hiring an attorney to represent the corporation.

3. In the instant case, Vincent Spohn, an attorney who had represented me in a domestic violence ("DV") matter, and whom I had hired to represent Communication Bridge USA ("CBUSA"), a subsidiary of CBG and a plaintiff in this case, whom I also paid and retained for an annulment by fraud matter, following the domestic violence matter, used his "insider" knowledge and skills to attack me by testifying on behalf of Chow and CBUSA in this matter, who stole my client trust account and trust property as a purported deposit towards his services in the preceding matters and did virtually no work in the DV matter and none in the annulment by fraud matter. Spohn failed to obtain any waiver of this obvious conflict of interest from me, for no clearly obvious reason on my part.

4. Chow, as my former business partner and a self-alleged co-founder of both CBUSA and CBG, had a fiduciary relationship to CBG and CBUSA, and had a further duty not to file frivolous lawsuits against CBG. Chow also forged proxies in the election in which he claimed to be purportedly elected Chairman and CEO of CBUSA.

5. In the instant case, Chow, Spohn, and Chow's attorney, Michael Fish ("Fish") all misrepresented material facts in this case by lying to the San Francisco Superior Court and the San Francisco Sheriff's Department and to the San Francisco Police Department in regard to (1) my right to remain in my office suite and home domicile (they claimed I had no right to occupy the premises, when in fact, as CEO of CBUSA, I was free to spend as much time as I wished in CBUSA's offices, which also served as my home and castle), (2) my alleged

propensity to destroy CBUSA's property (they said I was violent and would be likely to destroy CBUSA's property), and (3) lied that I was not actually the CEO of CBUSA (Chow claimed he was the CEO when I was actually still the legitimate CEO), and the like.

6. The complaint filed in this action states only facts alleging actionable conduct by me. A true and correct copy of the complaint filed in this action is attached hereto and hereby incorporated by reference as Exhibit 1. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf.

7. The Plaintiffs took their case against me in this action to trial and lost on all causes of action. See the *Statement Of Decision* written by Judge Goldsmith, the trial judge, a true and correct copy of which is attached hereto and hereby incorporated as Exhibit 2. The facts were found not to support any causes of action against me.

8. I challenged the fraudulent June 28, 2001 CBUSA elections as (1) Spohn had a duty to tell me that I never had to call the election in the first place; (2) Chow and Spohn conspired to illegally set up the fraudulent election; (3) Spohn, as my paid counsel, lobbied all shareholder to vote for Chow, in secret to me behind my back; (4) Spohn and his partner verified and forged proxies (which I believe are in Judge Goldsmith's possession right now) to steal both corporations- CBUSA and CBG as well as my complete estate in criminal conversion and then file false bankruptcy to cover up these felonies; (5) I never resigned as Chairman of the Board of CBUSA.

Dated: April 11, 2005

/s_____
Paul Currier

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SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*,	Case No. 01-323394
Plaintiff,	**DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
-vs.-	
PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*	
Defendants.	
PAUL TALCOTT CURRIER, Cross-Complainant,	[Entered May 2, 2005]
-vs.-	
ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay

I. INTRODUCTION

This memorandum of points and authorities is presented by Defendant COMMUNICATION BRIDGE GLOBAL, INC. ("CBG") in support of its motion for relief from the default judgment entered against it on January 17, 2002 [*sic*, should read "2003"], in the above-captioned action. This court has an inherent equitable power to set aside judgements that are inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, and also because the default judgment against CBG is not consistent with the judgment in favor of Defendant PAUL TALCOTT CURRIER ("Currier") after trial.

Plaintiff ROBERT CHOW ("CHOW") has filed an opposition to the instant motion.based on the fact that no proposed answer was filed with the motion. CHOW also opposes this motion based on his assertions that CHOW did not commit any fraud that concealed this action's existence or the need to file a responsive pleading from CBG. Finally, CHOW opposes this motion on the grounds that CBG waited too long to file this motion.

II. ARGUMENT

A. CBG Has Met the Requirements For Setting Aside the Judgment

1. Chow's Economic Oppression of Currier Is "Extrinsic Fraud"

This court has an inherent equitable power to vacate any judgment obtained through "extrinsic fraud or mistake." This power is not subject to the six-month limitations period set forth in C.C.P. §473; all a party seeking relief from judgment on the grounds of "extrinsic fraud" need show is that

he, she, or it proceeded diligently upon discovery of the fraud. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 at 983-984.

This brings us to a discussion of what constitutes "extrinsic fraud or mistake." That term has been interpreted very broadly by California courts, in that "extrinsic fraud or mistake" means virtually any circumstance by which a party was deprived of a fair hearing; **there need be no actual fraud or mistake for a court to properly grant relief on these grounds!** *Marriage of Park* (1980) 27 Cal.3d 337, 342. In other words, Fraud or mistake is "extrinsic" is it deprived the party of its "day in court." The wrongful conversion of all of Currier's and CBG's assets by Chow was sufficient to place CBG in a position where it could not hire an attorney to represent it, and therefore, CBG could not participate in the litigation. See, generally, the *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment* ("Currier Dec."), filed with the initial moving papers in this motion. For example, *McCreadie v. Arques* (1967) 248 Cal.App. 2d 239 the death or serious illness of counsel which prevents appearance at trial or a fair presentation of the cause may warrant setting aside the judgment where the circumstances could not have been prevented by due diligence.

Furthermore, Currier's attorney, Vincent Spohn, corruptly sold out Currier's interests to CHOW, as detailed in the Currier Dec., and in the moving papers. In fact, as stated in the initial motion papers, CHOW himself owed a fiduciary duty to Currier, which he breached, resulting in CBG's inability to file a timely responsive pleading in this case. CHOW also made several material misrepresentations of fact to this Court and to the San Francisco Police in order to force Currier out of 215 Leidesdorff Street in order to facilitate CHOW's theft of CBG's assets from the building.

The breach of a fiduciary duty arising from a confidential relationship, may warrant such relief,

even though the same actions, when taken in a non-fiduciary relationship, would **not** be considered extrinsic fraud.

2. CBG Has Met the Three Elements for Relief Under the Equitable Power

According to the case of *Gibble v. Car-Lene Research* (1998) 67 Cal.App.4th 295 - a party seeking relief under the Court's inherent equitable power to set aside unjust judgments after the six-month period for obtaining relief pursuant to C.C.P. §473 must satisfy three elements. The three elements are showing (1) the party has a meritorious case; (2) a satisfactory excuse for not presenting a defense in the original action, and (3) due diligence in seeking to set aside the judgment. In this case, CBG satisfies all three elements. CBG has a meritorious defense; namely, as stated below, that Currier has already successfully defended this case against CHOW, which is the basis for the motion for judgment on the pleadings which is Exhibit A to the *Declaration of Jeffrey Weiss In Support of Motion for Relief From Judgment* ("Weiss Dec."), filed herewith. Also, the allegations made against Currier are the same allegations made against CBG. The reason CBG did not present a defense was that CHOW's economic oppression of Currier and CBG made it impossible for CBG to defend itself. Finally, CBG moved for relief from judgment as soon as it had the financial means to hire Jeffrey Weiss as its legal counsel. As such, this Court can and should set aside the judgment.

B. Relief From Default is Proper Where, as Here, the Default Judgment Is Inconsistent with a Judgment Obtained From an Actual Trial on the Merits In the Same Case.

It is clear that where a default judgment is not consistent with a judgment reached against a co-

defendant based on the same fact and law, and the defaulting party moves to vacate the default, the motion to vacate the default should be granted. CHOW has not addressed this issue in his opposition, and has therefore admitted that CBG's position on this issue is correct.

To reiterate CBG's position on this issue, the complaint filed in this action states only facts alleging actionable conduct by Currier. Currier Dec., ¶6, Exhibit 1 to the Currier Dec. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. *Id.* The Plaintiffs took their case against Paul Currier in this action to trial and lost on all causes of action. See the *Statement Of Decision*, Currier Dec., Ex. 2, Currier Dec., ¶7. Since the facts supporting all the causes of action against Currier and CBG allege only conduct by Currier, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons, it follows that none of the causes of action against CBG have any evidentiary support, since the facts were found not to support any causes of action against Currier. *Id.* Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice to allow the default judgment against CBG in the instant action to stand.

III. CONCLUSION

For the reasons stated above, Defendant's motion for relief from default judgment should be granted.

Respectfully submitted,
WEISS & WEISSMAN

Dated: May 1, 2005

By:/s_____
Jeffrey Weiss
Attorneys for Defendant
Communication
Bridge Global, Inc.